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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-899

BAXTER K. WILLIAMS, ET AL., *Appellees Below,*

v.

THE ALBEMARLE CITY BOARD OF EDUCATION,
*Appellant Below.*

JOSEPH P. MOODY, ET AL., *Appellants Below,*

v.

ALBEMARLE PAPER COMPANY, ET AL., *Appellees Below.*

**On Certification of a Question From the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR THE ALBEMARLE CITY BOARD OF EDUCATION

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### OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court granting plaintiffs relief is unreported. A per curiam opinion of the United States Court of Appeals for the Fourth Circuit, affirming in part, vacating in part and remanding, has been issued,

but is unreported and will not become final until disposition of the question certified. Neither the findings of fact, conclusions of law, and order of the district court, nor the opinion of the court of appeals deal with the question certified.

## JURISDICTION

On December 6, 1973, the United States Court of Appeals for the Fourth Circuit certified a question to this Court pursuant to 28 U.S.C. § 1254(3). On January 14, 1974, this Court issued an order granting and inviting the parties to file briefs on or before February 13, 1974, in response to the question certified.

## STATUTES INVOLVED

This case involves 28 U.S.C. § 46, which provides, in relevant part, as follows:

> (c) Cases and controversies shall be heard and determined by a court of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the judges of the circuit who are then in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

The case also involves Rule 35 of the Federal Rules of Appellate Procedure, which provides in part:

> (a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard

by the Court of Appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

## QUESTIONS PRESENTED

Whether the United States Supreme Court should answer a question certified by a court of appeals because of a difference of opinion among the circuits, instead of awaiting a petition for certiorari, in a case in which proceedings in the court of appeals have effectively been completed.

Whether under 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure, a senior circuit judge, a member of the initial hearing panel, may vote in the determination of the question of whether the case should be heard *en banc*.

## STATEMENT

This case involves a claim for alleged employment discrimination under 42 U.S.C. § 1983, arising out of the desegregation of a public school system. The trial court found discrimination and awarded plaintiff,

*inter alia*, back pay. A panel of the United States Court of Appeals for the Fourth Circuit, which included one senior circuit judge, affirmed the finding of discrimination but vacated the back pay award. Upon a suggestion for a rehearing *en banc*, a vote of the court was held and the suggestion was defeated by an equal division of the judges of the court, including the senior circuit judge, who voted against the rehearing.

On December 6, 1973, the Court of Appeals for the Fourth Circuit certified the following question to this Court:

> Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be heard *en banc*?

Although the answer to the question certified may affect the outcome of the case in the court of appeals, the question itself does not touch on the facts or the merits of the case.

## SUMMARY OF ARGUMENT

### I

The certification jurisdiction is rarely invoked today because of this Court's traditional resistance to it. The source of this resistance is threefold: (1) a certified question is like a hypothetical question or an advisory opinion, (2) the proceeding is, in effect, an interlocutory appeal permitting piecemeal adjudication, and (3) the jurisdiction is otherwise mandatory and beyond this Court's control. For these reasons, the question certified must be appropriate in form and nature, and, in addition, will be answered only in "rare

instances" involving "exceptional" circumstances. This is not such a case. The Court of Appeals for the Fourth Circuit is divided on questions involving the merits, not on the question certified. Thus, if the question were answered, petitions for certiorari seeking resolution of these other questions would probably be filed immediately. Furthermore, the court of appeals has virtually completed its efforts and will not be spared further futile proceedings, the validity of which are threatened by the question's presence.

Although the question certified has divided the courts of appeals, that is an appropriate circumstance for certiorari, by means of which this Court alone may decide whether the question is of sufficient importance to be resolved now. Finally, although the question does involve the powers and duties of judges, it assumes determinative importance only rarely and involves powers and duties the exercise of which are hardly ominous. Thus there is no crisis in judicial administration here warranting a mandatory, piecemeal review, rather than a normal petition for certiorari.

## II

In 1969, it was held that a retired circuit court judge who had participated in the initial hearing of a case could not participate in its rehearing *en banc*. Shortly thereafter the provisions of the judicial code were amended to overturn this unwanted result. In the process, however, no explicit consideration was given to the question of whether this judge could also participate in the vote to order a rehearing, an act now seemingly barred by the literal words of those provisions of the judicial code that were essentially unchanged and had effected the prior unwanted result.

The legislative history and text of the amending act reveal no such purpose, however, and specifically list certain other duties that the retired circuit judge was not to perform. Furthermore, there is no apparent reason or policy that would induce Congress to form such a purpose. In fact, because a retired circuit judge who is a member of the initial hearing panel may clearly participate in the rehearing, as well as in the process of deciding whether a suggestion for a rehearing *en banc* will be put to a vote of the court, his exclusion from the intervening ordering vote would be inconsistent, to say the least. Consequently, the statutory language granting him the greater power to vote at the rehearing *en banc* should be construed to include the lesser, ancillary power to vote on whether the rehearing will be ordered. Such a construction, the merits of which have never been challenged by any substantial body of legislative or judicial opinion, is a reasonable interpretation of a statute which was designed to settle the retired judge problem and which specifically listed the duties which such judges were not to perform.

## ARGUMENT

### I. THIS COURT SHOULD DECLINE TO ANSWER THE QUESTION CERTIFIED.

#### A. Although The Question Certified Appears To Be In Proper Form, This Court May Decline To Answer It If No Significant Purpose Would Be Served By Expediting Its Resolution.

The certification jurisdiction at issue here, which is set forth in 28 U.S.C. § 1254(c), appears to be couched in mandatory terms. Nevertheless, this Court has so frequently declined to answer questions certified to it that it has in effect rendered the grant discretionary. C. Wright, *Federal Courts* § 106 (2d Ed. 1970); J.

Moore and A. Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 Va. L. Rev. 1, 22 (1949). Admittedly, many certified questions have not been answered because they were inappropriate in form or nature, problems apparently not present here. Other questions evidencing no such defects, however, have also not been answered. *Wisniewski v. United States*, 353 U.S. 901 (1957); *Rushen v. Electric Utilities Union*, 323 U.S. 72 (1944). In explanation of these refusals, the Court has stated that this jurisdiction is "exceptional," *Wisniewski v. United States*, *supra* at 902; *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576 (1930), and that the question certified must be "substantial," as well as proper in form and nature. *Biddle v. Lurisch*, 266 U.S. 173, 175 (1924). Indeed, these statements, coupled with the Court's manifest reluctance over the years to entertain such questions and the attendant reluctance of the courts of appeals to submit them, suggests that a question will not be answered unless some significant purpose will be served by expediting its resolution in this manner. Thus in *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (emphasis added) the Court said:

> It is also the task of a Court of Appeals to decide all properly presented cases coming before it, *except in the rare instances*, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and *expedition* of judicial business.

Limiting the certification jurisdiction to "rare instances" is appropriate and of increasing validity today. Originally the jurisdiction was needed to circumvent a difference of opinion in a two judge circuit

court that was thereby unable to reach decision and render an appealable order or judgment. J. Moore & A. Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 Va. L. Rev. 1, 10-11 (1949). That problem was obviated by the Act of 1891, 26 Stat. 826 et seq., § 2 (1891), which stripped the circuit courts of the power to certify questions to the Supreme Court, created the circuit courts of appeals, and transferred this power to them in terms that are essentially unaltered today. Although Senator Evarts, the bill's sponsor in the Senate, viewed the certification power as a useful device to settle differences of opinion within each circuit court of appeals and among the different circuit courts of appeals, Remarks of Senator Evarts, 21 Cong. Rec. 10222 (1890), these functions have largely been assumed over the years by other jurisdictional grants. Thus certiorari has become the principal access route to this Court for the settlement of inter-circuit differences; and the *en banc* hearing has become the principal device for the settlement of intra-court disputes. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 335 (1941). Even the equal division of the judges of a court of appeals in an *en banc* hearing does not require the assistance of the certification power, since the judgment of the trial court, as affirmed by an equally divided court of appeals, is reviewable by this Court. *Peake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 291 F.2d 329 (2d Cir.), *aff'd*, 370 U.S. 254, 255 n. 1 (1962).

In addition to the diminished utility of certification, its use is antagonistic in principle to this Court's expanding need to control its crowded dockets and to curtail the volume of its mandatory jurisdiction, as is evidenced by the procedures it has established to screen

cases asserting a right of appeal. The courts of appeals should not be empowered to decide in their sole discretion through certification what matters are of sufficient importance to require decision by this Court. That is increasingly a matter for this Court alone to decide. C. Wright, *Federal Courts* § 106 (2d Ed. 1970).

In sum, the certification jurisdiction has become a little needed and little used anachronism. Consequently, it is entirely appropriate that this Court decline to answer any question the expeditious resolution of which serves no significant purpose.

**B. No Significant Purpose Will Be Served By Expediting The Resolution Of The Question Certified.**

The Certificate of the United States Court of Appeals for the Fourth Circuit reveals that in *Moody, et al. v. Albemarle Paper Co., etc., et al.*, No. 72-1267, the rehearing *en banc* has already been held and a tentative decision has been reached. If this Court does not answer the question certified, the court of appeals need only confirm its tentative decision and issue an opinion. The aggrieved party could then apply for certiorari because of a conflict among the circuits with respect to the question certified and because of important questions upon which the court of appeals is divided in the disposition of the case on the merits. In *Williams et al. v. The Albemarle City Board of Education, etc.*, No. 73-1179, the vote was to deny a rehearing *en banc*. Consequently, if this Court does not answer the question certified, the decision and opinion of the initial hearing panel will remain the decision of the court, and the party aggrieved may apply immediately for certiorari.

Thus the Court of Appeals has virtually terminated its proceedings in both cases and can conclude them expeditiously without this Court's assistance. Therefore, an answer to the question certified will neither break a judicial deadlock there nor obviate a lengthy proceeding, the validity of which is threatened by the incorrect resolution of a threshold question of law, two possibilities which this Court has previously recognized as reasons for invoking the certification jurisdiction. For example, in *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), this Court suggested that certification would be appropriate if the same issue were raised by another case already pending before it. And in *United States* v. *Barnett*, 376 U.S. 681 (1964), the most recent case successfully invoking the certification jurisdiction, the Court of Appeals for the Fifth Circuit had divided on the question of whether the defendants were entitled to a jury trial in a proceeding to hold them in contempt of an order of that court. But there the court of appeals was exercising original jurisdiction, its members were equally divided on the question and it could not, therefore, render an appealable order or judgment until the deadlock was broken. Suppose, however, that a bare majority of that court had correctly concluded that jury trial was not required. Arguably the court might still have reasonably sought an immediate answer to the question because of its closeness and threshold nature and because of the unusual public importance of the proceeding itself.

By contrast, no such purposes would be served by answering the question certified here. The Judges of the Fourth Circuit are divided on questions involving the merits of the two cases, not on the question cer-

tified. In *Moody*, the *en banc* hearing has already been held; in *Williams*, it has effectively been denied. Thus the resolution *now* by this Court of the question certified, rather than *later* upon a grant of certiorari, will obviate only the writing of an opinion on the merits for the court *en banc* in *Moody*. In return, however, a rehearing *en banc* in *Williams* may be required, and, more importantly, petitions for certiorari would probably soon thereafter be filed seeking review on the merits. As appears in their Memorandum On The Appropriateness of Certification From The Court of Appeals For the Fourth Circuit, p. 2, n. 1, plaintiffs emphasize that the two cases raise important questions on the merits, upon which the members of the court of appeals are closely divided, involving, *inter alia*, the proper interpretation of this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Thus, whichever way the certified question is answered, one or both of the sides in both cases would probably seek certiorari.[1]

In sum, declining to answer the question certified would require no additional proceedings in the court of appeals and would limit the proceedings in this Court, if certiorari were granted, to a single occasion.

[1] If the question certified were answered in the affirmative, in *Williams* the decision of the initial hearing panel would become the decision of the court, and plaintiffs would presumably seek certiorari to review its decision reversing an award of damages; in *Moody* the Fourth Circuit predicts that it will modify the decision of the initial hearing panel, which reversed the trial court's denial of back pay, as a result of which one or both sides may apply for certiorari. If the question certified were answered in the negative, a rehearing *en banc* would presumably have to be held in *Williams*. The court of appeals opines in its certificate that it would then divide equally and affirm the judgment of the district court awarding damages, a result that would create for defendant an appealing occasion to seek certiorari.

By contrast, if the question certified were answered, it might require another rehearing *en banc* in the court of appeals and an additional proceeding on the merits before this Court. This situation is analogous then to one in which a verdict winner seeks to obtain immediate review in a court of appeals by writ of prohibition of a district court's debatable ruling that it was empowered to grant judgment notwithstanding the verdict on its own motion because it reserved decision on a motion for directed verdict, in a case where the question of the sufficiency of the evidence was also extremely close. The writ would surely be denied in such a situation, without regard to the fact that the question involved affects the duties, responsibilities and powers[*] of the judges of the federal district

[*] The Certificate of the Court of Appeals for the Fourth Circuit pointedly employs these words without further explanation as if they had some talismanic significance. Upon analysis, however, no such significance appears. Questions involving the powers of courts or judges may perforce arise more frequently than substantive questions. But, as the Court's Certificate also reveals, this is the first time that the proper construction of the Act of 1963 to clarify the status of judges after retirement has assumed determinative importance in the Fourth Circuit. Thus, deferring resolution of the question until certiorari is granted does not realistically involve the risk that decisions in numerous other cases will be similarly "flawed." Furthermore, although erroneous rulings by judges enlarging their powers may sometimes invoke the specter of oppressive judicial overreaching, which should obviously be corrected at the first opportunity, no such possibility is involved here. Senior judges are clearly empowered to participate by assignment in the decision of the initial hearing panel and thereafter in any rehearing *en banc*. Assuming *arguendo* that these judges are prohibited by statute from also participating in the vote to determine whether a rehearing *en banc* shall be ordered, a less harmful exercise of unconferred power could hardly be imagined. Thus, the fact that this one aspect of the duties, responsibilities and powers of these judges is in question does not create a crisis in judicial administration.

courts, because the proceedings in the district court were almost completed. Furthermore, the case would probably be appealed on the merits even if the writ were granted, and, if the writ were denied and on appeal it was held that the trial judge lacked the power in question, the court of appeals could still order the entry of judgment on the verdict without the necessity for a new trial. Appellant, The Albemarle City Board of Education, submits that this case is no different in any significant regard,[3] and that expediting resolution of the question raised here would similarly cause delay and consume additional judicial time without accomplishing any significant offsetting purpose.

Thus, the only apparent justification for certification here is the existence of a division among the circuits on the question certified. On at least one occasion this Court has answered a certified question for this reason. *United States* v. *Wise Law*, 245 U.S. 387 (1918); *cf. Middletown Nat. Bank* v. *Toledo*, 197 U.S. 391 (1905) (answering a question of state law upon which there was only potential conflict among the states); *but see Columbus Watch Co.* v. *Robbins*, 148 U.S. 266 (1893). But as the number of such intercircuit differences has proliferated since that time, access to this Court to resolve them has been almost exclusively limited to the grant of certiorari, and it would hardly be prudent today to reaffirm the now almost extinct principle that a difference among the

[3] The verdict winner may obviously appeal to the court of appeals if, in the example given, the writ is denied and judgment notwithstanding the verdict is entered, whereas the party aggrieved here could only apply for certiorari to resolve the question if it is not answered. But if the question certified is regarded as being of sufficient importance, this Court is hardly foreclosed from granting certiorari to resolve it.

circuits is *alone* sufficient to invoke the certification jurisdiction. Indeed, it would come as a great surprise to all those disappointed litigants who have sought unsuccessfully since then to obtain certiorari on the ground that they might otherwise have gained their end by first requesting the court of appeals to certify the disputed question.

For all these reasons, no significant purpose would be served by expediting the resolution of the question certified, and accordingly, this Court should decline to answer it.

**II. IF THE QUESTION CERTIFIED IS ANSWERED, IT SHOULD BE ANSWERED IN THE AFFIRMATIVE.**

The question certified reads as follows:

> Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be heard *en banc*.

In *United States* v. *American Foreign Steamship Corp.*, 363 U.S. 685 (1960), this Court held that a retired circuit judge who had participated in an initial panel decision before retirement was not permitted to participate in the rehearing of the case *en banc*. This result was said to be required by 28 U.S.C. § 46(c), which provided that in the United States Court of Appeals "(c)ases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service," and that "(a) court in banc shall consist of all active circuit judges of the circuit." The opinion, however,

conceded that "persuasive arguments" could be advanced for allowing such participation in the future and called favorable attention to corrective legislation that had been recommended by the Judicial Conference of the United States. Several years later Congress enacted P.L. 88-176, 77 Stat. 331 (1963), "Judges: Status After Retirement," "An Act to clarify the status of circuit and district judges retired from regular active service." This enactment, which made certain editorial changes in the first two sentences of § 46(c) and added a third in the language recommended by the Judicial Conference, provides as follows:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consists of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

In their renowned book, *The Legal Process: Basic Problems in the Making and Application of Law* (Tentative Edition 1958), Professor Hart and Dean Sacks refer to such events as the interstitial correction of decisional doctrine. In this process, the note, litigation frequently ensues because of negative implications arguably pregnant in the legislature's failure to touch on related problems, and too often there follow discordant constructions totally at odds with the legislature's manifest purpose. *Id.* at 802-03. Such a problem is presented here. An overly literal reading of the

sentence added to § 46(c) in 1963 suggests that a retired circuit judge who sat in the court or division at the original hearing has been empowered to participate only in the rehearing *en banc*, and, therefore, has been excluded by negative implication from participation in the vote to determine whether a rehearing *en banc* will be ordered. On the other hand, this sentence can also be read to provide that such a retired judge is deemed to be a judge in regular active service for purposes of the entire rehearing process governed by the first two sentences, on the theory that the grant of the greater power to participate in the rehearing itself carries with it the lesser ancillary power to participate in the vote ordering a rehearing.

Such a construction, which the Fourth Circuit has apparently adopted, is consistent with Rule 35(b) of the Federal Rules of Appellate Procedure,[1] which provides that such retired judges may also participate fully in the decision as to whether the suggestion of a party for rehearing *en banc* will be put to the vote of the judges of the Circuit. Thus, those who dispute the Fourth Circuit's construction must contend that, although such retired circuit judges may participate fully in the process of deciding whether there will be a vote on a suggestion for a rehearing *en banc* and in the actual rehearing *en banc*, they were intentionally excluded by the Judicial Conference and by Congress from participating in the vote to order such a rehearing. But no such purpose is disclosed in the words of the statute or in its legislative history. In fact, there

[1] Fed. R. App. Pro. 35(a) merely adopts the language of 28 U.S.C. § 46(c) with respect to who may participate in the vote to order a rehearing *en banc*. Thus it assumes no additional significance in determining the proper construction of the statute.

is no mention whatsoever of this question, much less its proposed solution, in the reports of the Judicial Conference, 1959 Ann. Rep. of the Judicial Conference 9-10, or in the Reports of the House and Senate urging enactment of the proposed legislation. Contrariwise, the letter transmitting the recommendations of the Judicial Conference to the Speaker of the House of Representatives, and the Senate Report,[5] both of which are set forth in 1963 U.S.C. Cong. & Ad. News 1105-06, state that the legislation was specifically designed to exclude retired circuit judges from certain other duties; namely, participating in the appointment of officers of the court, participating in the promulgation of the rules of the court, and sitting as a member of the judicial council of the Circuit. Can it then be maintained that Congress and the Judicial Conference, while specifically dealing with those duties that a retired judge was not to perform, intended by negative implication to bar him from the performance of another duty merely ancillary to the one he was specifically authorized to perform?

To overcome this dilemma, the Memorandum of Appellants Moody, et al., and Appellees Williams, et al., on the Appropriateness of Certification from the Court of Appeals for the Fourth Circuit, pp. 10-13, suggests that sound policy supports the exclusion of such retired judges from the vote to order a rehearing *en banc*. The Memorandum fails, however, to point to anything in the legislative history of the Act of 1963 indicating Congressional awareness or approval of such a judgment. In fact, there is no such history and the suggestion represents nothing more than an ingenious

[5] The House Report is identical to the Senate Report

effort by counsel to provide a justification for an imagined legislative purpose. Even the ingenuity of the argument is questionable. The Memorandum suggests that the members of the court in regular active service are primarily responsible for its integrity as an institution and are in the best position to decide when an *en banc* hearing is needed to harmonize conflicting panel decisions or to decide important questions; therefore, Congress could reasonably have sought to distinguish between participation in the rehearing and participation in the vote to order it. But, as the Memorandum itself discloses, this is the very same argument formerly employed to justify the exclusion of retired circuit judges from participation in the rehearing itself. Thus an argument that Congress presumably interred in the Act of 1963 is now resuscitated to justify an otherwise undisclosed purpose in that very same enactment.

Considered on its merits alone, the argument also fails. A retired circuit judge who participates in the initial hearing must obviously familiarize himself with any prior decisions that might conflict with the panel's decision. For this reason arguably he would be more informed on the need for a rehearing than would the court's other nonparticipating members, who may not fully recall or be familiar with these prior, allegedly conflicting decisions. Perhaps because he is so informed, Rule 35(b) of the Federal Rules of Appellate Procedure wisely permits him to participate fully with the other members of the panel in determining whether a suggestion for a rehearing *en banc* will be put to a vote of the court. And, for the same reason, 28 U.S.C. § 46(c) authorizes him to participate fully in the rehearing itself. Since he may then participate fully in

the first and third stages of the rehearing process, his deliberate exclusion from the second stage would be inconsistent, to say the least. The suggestion that Congress reasonably intended this inconsistency is beyond belief.

In support of this conclusion, it should be noted that while the Court of Appeals for the Second Circuit has ruled that Congress failed to authorize such participation in the second stage, a majority of its members regard this omission as inconsistent and unfortunate. *Zahn* v. *International Paper Company*, 469 F.2d 1033, 1041, 1042 n. 1 (2d Cir. 1972) (concurring opinion of Judge Mansfield and dissenting opinion of Judge Timbers on petition for rehearing *en banc*), *aff'd. on the merits*, 94 S. Ct. 505 (1973). Furthermore, the decision of the Court of Appeals for the Fifth Circuit in *Allen* v. *Johnson*, 391 F.2d 527 (5th Cir. 1968), while not specifically in point here,[6] suggests that its members would also support the full enfranchisement of these retired judges. In fact, during the entire time that the "problem" of these judges has shuttled back and forth between the Congress and the courts, no significant body of judicial or legislative opinion opposing their participation in any

[6] This case held that a retired circuit judge who was a member of the initial hearing panel was competent to sit at a hearing or rehearing *en banc*, even though the panel had not announced a decision or rendered an opinion in the case. In concluding, the opinion stated that "en banes can be ordered only by active judges." 391 F. 2d at 532. Whether this dictum represents the conclusion that the court would reach after full consideration of the question presented here is not as clear as the Memorandum of Appellants Moody, et al., and Appellees Williams, et al., p. 10 n. 7, unequivocally suggests, especially in view of that court's willingness to read § 46(c) expansively on the facts of that case.

stage of the rehearing process has emerged. Surely the time has now come for this Court to put an end to this demeaning process, by which the capabilities of these retired judges have at least implicitly been questioned.

Consequently, we would urge that the final sentence of § 46(c), which extends to retired circuit judges the greater power to participate fully in the rehearing *en banc*, should be read to include by implication the lesser, ancillary power to participate in the vote to order such a rehearing. Such a reading is clearly not beyond the limits of reasonable statutory construction. In *Allen v. Johnson*, 391 F. 2d 531 (5th Cir. 1968), the court similarly read the statute expansively to reach an analogous result. And as the opinion there noted, that court increasingly requires the assistance of these judges "to keep up with its exploding docket . . . ." 391 F. 2d at 529. Surely if the busy active members of the court can profit from the special expertise of the retired judge in the first and third stages of the rehearing process, they can profit as well from his participation in the second.

Admittedly, the construction we urge requires a certain elaboration of Congressional purpose beyond the literal words of the statute. But the judicial role is not simply one of literary critic standing in judgment of the works of Congress. Rather, the courts are the coequal partners of the legislature in assuring the just and sensible elaboration of statutes. As Professor Hart and Dean Sacks have stated:

> Enacted law may displace decisional law as a means of initial formulation of legal arrangements, but not as a means of elaboration. For enactments need to be interpreted, and interpre

> tation can scarcely be avoided at the stage of authoritative applications in the decision of particular controversies. *Here the two forms of law work in cooperation rather than competition.*[1]

This Court has, on occasions too numerous to recount here, harmonized apparently inconsistent statutory words, or declined to give substance to unintended negative pregnants. There come to mind immediately the numerous decisions harmonizing and interpreting the provisions of the Robinson-Patman Act. *E.g., Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969); *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). More closely in point perhaps is the refusal of the federal courts to conclude that the provisions of 28 U.S.C. § 1338(b), providing for pendent jurisdiction of "a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws," were intended by negative implication to forbid further judicial extension of the doctrine to other areas. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In conclusion, we contend that the construction we have urged clearly embodies the true legislative purpose, and that the failure of Congress to make this meaning explicit in the final sentence of § 16(c) should be regarded, to use the felicitous words of Mr. Justice Holmes, as a "mis-prision or abbreviation that does not conceal the purpose to be gathered from the previous and following words." *St. Louis San Francisco R.R. v. Middlekamp*, 256 U.S. 226, 232 (1921). Here the other provisions of the Act of 1963 specifi-

[1] H. Hart and A. Sacks, *The Legal Process* 140 (Tentative Edition 1958) (emphasis added).

cally listing those other powers that retired circui
judges were not to exercise cogently supports this con
*Fred Meyer, Inc.*, 390 U.S. 341 (1968). More closel
clusion. 1963 U.S.C. Cong. & Ad. News 1105-06.

## CONCLUSION

Appellant, The Albemarle City Board of Education
respectfully urges this Court to decline to answer th
question certified. Alternatively, if the Court de
cides to answer the question, it is submitted that th
proper answer is in the affirmative.

Respectfully submitted,

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